Asainar bin Sainudin & Anor v Mohamad Salam bin Sidik (suing through his representative Sidik bin Sarmidi)

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–42 OF 1997
ABDUL WAHAB J
12 SEPTEMBER 2001

Civil Law Act *— Damages — Personal injuries — Claim for future costs of nursing care — Use of annuity table or direct multiplication — Maximum of 16 years of purchase — Contingencies — How award should be calculated*

The defendants/appellants appealed against the quantum of award made by the sessions court judge wherein the calculation was based on 56 years of purchase; and which was used as a direct multiplier for costs of nursing care, diapers and wheelchair, for the plaintiff/respondent who was 14 years of age at the time of the accident. The appellant contended that the awards should be calculated on the basis of the annuity tables or alternatively, if calculated upon a straight multiplier, then a deduction of a third should be made to the 56 years purchase.

Held, allowing the appeal:

(1) The debate whether to use the annuity table or a direct multiplication does not depend on what is the cost of damage on a monthly or other basis over a period of time, but depend on how that lump sum is arrived at or calculated. The straight calculation over an expected lifetime, which in this case was 56 years purchase, had resulted in overpayment. On the other hand, the annuity calculation is very precise, but by its precision, it failed to allow for the probability of inflation, and even the possibility that the recipient could live longer than foreseen when the calculations were made (see pp 108F, 109B–C).

(2) The conclusion that the limit of a maximum of 16 years purchase in s 28A of the Civil Law Act 1956 ('the Act') is harsh arise from the misunderstanding of the very nature of lump sum payments. The lump sum payment is intended to be a capital sum, which is invested to give the monthly sum due. The lump sum is calculated from the monthly sum due, which as a present monthly cost could easily be determined. But it is undeniable that costs could increase in the future. Since an accurate prediction as to the future is impossible, the way to deal with future cost increases is to allow for contingencies. The age of the injured party, the nature of the injuries as well as nature of remedy for which cost if incurred would affect the contingency (see p 109E–G).

(3) For the estimation of contingency, the court would take the following considerations. The 16 years formula under s 28A of the Act assumes that the lump sum is invested at 6.25%pa, and thus

generating indefinitely the intended monthly payment. In seeking to estimate a contingency to account for future cost increases of nursing care, diapers and wheelchairs, an assumption of cost increases of up to that magnitude was not unreasonable. An assumption that the respondent could expect to live to 60 years of age was neither too optimistic nor too pessimistic. Considering that the respondent may be expected to live for another 46 years, a contingency of 100%, ie to double the present day costs was to be applied (see p 111A–E); *Marappan Nallan Koundar & Anor v Siti Rahmah Ibrahim* [1990] 1 MLJ 99 followed.

[Bahasa Malaysia summary

Defendan-defendan/perayu-perayu telah merayu terhadap kuantum award yang dibuat oleh hakim mahkamah sesyen, di mana pengiraan adalah berdasarkan 56 tahun belian; dan yang digunakan sebagai pengganda langsung untuk kos rawatan, lampin dan kerusi roda, untuk plaintif/responden yang berumur 14 tahun pada masa kemalangan. Perayu menegaskan bahawa award-award tersebut sepatutnya dikira berdasarkan jadual tahunan atau secara alternatif, jika dikira dengan pengganda lurus, maka pemotongan satu pertiga sepatutnya dibuat terhadap 56 tahun belian tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Perdebatan sama ada untuk menggunakan jadual tahunan atau satu penggandaan langsung bukan bergantung kepada apakah kos ganti rugi setiap bulan atau asas lain untuk satu tempoh masa, tetapi bergantung kepada bagaimana satu jumlah sekaligus diperolehi atau dikira. Penggandaan lurus yang digunakan untuk sepanjang hayat, di mana dalam kes ini adalah 56 tahun belian, telah mengakibatkan pembayaran lebih. Sebaliknya, pengiraan tahunan adalah tepat, tetapi kerana ketepatannya, ia gagal untuk membenarkan kemungkinan berlakunya inflasi, dan juga kemungkinan bahawa penerima boleh hidup lebih lama daripada yang disangkakan semasa pengiraan tersebut dibuat (lihat ms 108F, 109B–C).

(2) Kesimpulan bahawa had maksima 16 tahun belian dalam s 28A Akta Undang-Undang Sivil 1956 ('Akta tersebut') adalah kejam timbul daripada salah faham tentang sifat bayaran sekaligus. Bayaran sekaligus bertujuan untuk satu jumlah modal, yang dilaburkan untuk memberikan jumlah bulanan yang terhutang. Jumlah sekaligus tersebut dikira daripada jumlah bulanan yang terhutang, di mana kos bulanan terkini dengan senang boleh ditentukan. Tetapi tidak boleh dinafikan kos-kos akan meningkat di masa hadapan. Oleh kerana ramalan yang tepat tentang masa hadapan adalah mustahil, cara untuk mengendalikan kos kenaikan masa hadapan adalah dengan membenarkan kontingensi. Umur pihak yang cedera, sifat kecederaan dan juga

sifat remedi di mana kos jika dikenakan akan memberi kesan kepada kontongensi (lihat ms 109E–G).

(3) Untuk anggaran kontingensi, mahkamah akan mempertimbangkan berikut. Formula 16 tahun di bawah s 26A Akta tersebut mengandaikan bahawa jumlah sekaligus dilaburkan pada 6.25% setahun, dan oleh itu menjanakan bayaran bulanan untuk tempoh yang tidak dapat ditentukan. Bagi mendapatkan anggaran satu kontingensi untuk bayaran kenaikan kos masa hadapan bagi rawatan, lampin dan kerusi roda, satu andaian kenaikan kos sehingga sebegini besar adalah munasabah. Satu andaian bahawa responden boleh hidup sehingga 60 tahun juga bukan terlalu optimistik maupun pesimistik. Dengan mengambilkira bahawa responden mungkin boleh hidup 46 tahun lagi, satu kontingensi sebanyak 100%, iaitu untuk menggandakan kos-kos masa kini, dipakai (lihat ms 111A–E); *Marappan Nallan Koundar & Anor v Siti Rahmah Ibrahim* [1990] 1 MLJ 99 diikut.]

Notes

For cases on personal injuries generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2692–2697.

Cases referred to

Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (folld)
Tan Cheong Poh & Anor v Teow Ah Keow [1995] 3 MLJ 89 (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(d)

S Suresh (*Jude Raj* with him) (*Kanaga Suresh & Co*) for the appellant.
L Parthiban (*Zainal Kamis* with him) (*L Parthiban & Associates*) for the respondent.

Abdul Wahab J: The subject of the appeal by the defendants ('the appellants') is the quantum of award made by the judge of the sessions court against the appellants, wherein the calculation was based on 56 years' purchase; and which was used as a direct multiplier for costs of nursing care, pampers and wheelchair, for the plaintiff ('the respondent') who was 14 years of age at the time of the accident.

For nursing care, the learned judge awarded the sum of RM18,000 for the pretrial period of five years; and RM200 x 12 x 51 = RM122,400 for the balance 51 years. For the cost of pampers, the learned judge awarded RM129 for three packages per month. The learned judge awarded RM129 x 12 x 51 = RM78,948 for the post trial 51 years, and overlooked RM43 x 3 x 12 x 5 = RM7,740 for the pretrial period of five years. The respondent however did not appeal. In respect of the wheelchair, taking into account that the plaintiff had used three wheelchairs in two years, and having paid

A RM450 for the first and RM500 for the second and third wheelchairs, the learned judge had awarded RM500 x 56 x 2 = RM14,000.

The appellants submit that the awards should be calculated on the basis of the annuity tables or alternatively, if calculated upon a straight multiplier, then a deduction of a third should be made to the 56 years purchase.

B The first question posed in this appeal is whether, under s 28A of the Civil Law Act 1956 ('the Act'), effective 1 October 1984, the award is to be calculated on a straight multiplier basis or based upon the annuity tables.

Section 28A provides as follows:

C Damages in respect of personal injury

(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —

(a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

D (b) any pension or gratuity, which has been or will or may be paid as result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

E (2) In assessing damages under this section —

(a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to F be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the court shall take into account —

(i) that in the case of a plaintiff who has attained the age of fifty five G years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

H (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at I the time when he was injured;

(d) in assessing damages for loss of future earnings the court shall take into account that —

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

The limitations under s 28A(2) of the Act apply in respect of loss of expectation of life caused by the injury, and assessment and award of damages for loss of future earnings. No mention was made of other heads of damages that cannot be categorized as loss of future earnings, such as cost of nursing care, pampers and wheelchairs. Thus, it is clear that on the face of it, s 28A(2) of the Act affects claims for loss of expectation of life and for loss of future earnings only, and does not purport to affect other heads of claims.

Counsel for the appellants relied upon *Tan Cheong Poh & Anor v Teow Ah Keow* [1995] 3 MLJ 89 where the Court of Appeal held that the trial judge had properly used the annuity tables on the correct basis that Teoh Ah Keow who was 23 years old, could be expected to live up to 60 years. The cause of action in *Tan Cheong Poh & Anor v Teow Ah Keow* however, arose in 1982 when reliance upon the annuity tables was still the practice. The decision did not purport to be applicable to post 1 October 1984 when s 28A of the Act came into effect. Indeed the trial judge was held to have erred in relying on s 28A of the Act in relation to loss of future earnings. The case cannot therefore be read as having established any principle that the annuity tables continue to be used for heads of claims other than loss of expectation of life and loss of future earnings under s 28A(2) of the Act.

The debate between whether to use the annuity tables or a direct multiplication is not one concerning what is the cost of the damage on a monthly or other basis over a period of time, but about how that lump sum is to be arrived at or calculated for a lump sum award. For example, an award of RM200 per month for 56 years, on a straight multiplication of RM200 x 12 x 56, would give a sum of RM134,400. But this sum of RM134,400 if deposited in a simple interest bearing account at 4% interest would yield RM448 per month, well in excess of the intended RM200 per month.

Furthermore, if payment is awarded and paid as a lump sum at the beginning, the last RM200 for the end of the 56th year is received at the beginning, ie 56 years too early. If deposited and earning 4% compounded, the RM200 plus accumulated interest would rise to about RM1,798 by the end of the 56th year. Indeed the sum total of all individual monthly RM200 payments deposited separately on a similar basis for the periods until they are due, would result in a total of nearly half a million ringgit. If then only RM200 was actually used every month for 56 years, the recipient of RM134,400 at the beginning would have profited by about RM365,000.

A On the other hand, a modest sum of RM60,000 deposited at the beginning in an interest bearing account, even if earning a modest 4% simple interest, would earn RM2,400 pa, thus easily giving RM200 per month, for an indefinite period, and at all times maintaining intact the capital sum of RM60,000. The annuity tables would refine the formula further such that the capital sum would also reduce to zero over the given B period, which in case of the above example, is 56 years.

Each of these methods of calculations has its strengths and weaknesses. The straight calculation over an expected lifetime, which in this case is 56 years' purchase, results, as illustrated above, in overpayment. It ignores the basic prudence that a lump sum would be placed in an interest bearing C account. Its strength is that the interest derived could help to cover the costs of unpredictable inflation. Yet the calculations show that the interest earnings over the period to be very substantial. On the other hand, the annuity calculation is very precise, but by its precision, it fails to allow for the probability of inflation, and even the possibility that the recipient could live longer than foreseen when the calculations were made. This last could D mean that if the recipient actually lives longer than expected, he may face the prospect of having nothing at all left to rely on. Uncertainty or contingency occurs then in respect of: (a) the probable rising costs over and above the present costs; (b) the interest rate obtainable for the deposit; and (c) the possibility the recipient may live longer than expected.

E In this light, the limit of a maximum of 16 years purchase in s 28A of the Act may appear to be harsh and uncaring, particularly as in this case where the respondent is 14 years old and could live for another 56 years. In my view, such a conclusion arises from misunderstanding of the very nature of lump sum payments. Firstly, the lump sum payment is intended to be a capital sum, which is invested to give the monthly sum due. The lump sum F is calculated from the monthly sum due, which as a present monthly cost can easily be determined. But it is undeniable that costs could increase in the future. In addition, the probability and increase of cost increases with the length of the term. In practice nobody can predict with any accuracy what will be the case in five years or 16 years time, let alone 56 years. Thus, G previous cases have held that the way to deal with future cost increases is to allow for contingencies. The age of the injured party, the nature of injuries as well as nature of remedies for which cost is incurred affect the contingency. Thus, though an injury might well shorten the life of a person the fact that he is younger than another justifies a contingency he would live longer than one older than he; and the longer the period the more likely H there will be an increase in cost.

In *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the Supreme Court had rejected the submission by counsel in relation to s 28A of the Act that the use of annuity tables had not been repealed and should therefore continue to be used after 1 October 1984:

I

> In the fourth and fifth grounds of appeal the appellants stated that the learned judge had misdirected himself that the usage of the annuity tables in this country was more a matter of practice than of law. It was submitted by counsel

that the learned judge ought to have applied the annuity tables in calculating the award of damages in accordance with the trend of previous awards and had misdirected himself in holding that the direct multiplier should apply to the case of the plaintiff 'as contingencies and the lump sum payment had been taken care of by the amendment as to the set multiplier'. In the event the learned judge had awarded RM350 x 12 x 16 amounting to RM67,200 for the cost of future care and RM345 x 12 x 16 totalling RM66,240 for future loss of earnings. Counsel's contention was that s 28A of the Civil Law Act 1956, relating to damages in respect of personal injury has not referred to the annuity tables which have been used in this country as a matter of practice for a long time. *He submitted that the annuity tables have not been 'repealed' and should therefore still be used calculating the award of damages in accordance with the trend of previous awards. We rejected that submission of counsel, because there is no need of any legislation to repeal what was a matter of practice*, and considered that the learned judge had not misdirected himself in applying the direct multiplier rather than using the annuity tables in calculating the award of damages for the cost of future care and loss of future earnings in this case. (Emphasis added.)

In *Marappan & Anor v Siti Rahmah bte Ibrahim*, the accident occurred on 12 October 1986. Section 28A of the Act was applied. The respondent Siti Rahmah Ibrahim was 23 years old at the time of accident. The award for cost of future care, at RM350 per month, calculated on the maximum 16 years' purchase: RM350 x 12 x 16 = RM67,200, was sustained by the Supreme Court. It is clear that the Supreme Court extended the principle of s 28A(2)(d) of the Act, of straightline calculation to a maximum of 16 years to heads of damages other than loss of future earnings.

There is much to be said in favour of applying a single consistent principle throughout. I have said earlier above that the limitation to 16 years' purchase may appear to be harsh and uncaring. The key factor to understanding the limitation of 16 years is understanding that the period of 16 years was arrived at upon the assumption that the lump sum awarded is invested and obtains a return of 6.25%. In the example above, a sum of RM200 x 12 x 16 = RM38,400 would still yield RM200 per month indefinitely if it were earning interest of not less than 6.25%pa without diminution of the capital sum. Thus, even though there seems to be an artificial limitation of 16 years purchase, the lump sum could provide for a constant income stream for a nearly indefinite period if the capital sum is prudently deposited. The key factor is obtaining a rate of return of at least 6.25%.

In this case, the monthly sums as well as the cost of the wheelchair, as summarized in para 2 above, were determined upon a straight calculation of 56 years. Without allowing for contingencies of future cost increases the calculation based upon *Marappan & Anor v Siti Rahmah bte Ibrahim*, and would be as follows:

(i)	Nursing care: RM200 x 12 x 16	=	RM38,400
(ii)	Pampers: RM129 x 12 x 16	=	RM24,768
(iii)	Wheelchair: RM500 x 16/2	=	RM 4,000

But it cannot be overlooked that these costs of nursing care, pampers and wheelchairs can only be expected to rise in the future. It cannot be denied that the longer the future period, the more will be the increase. It is only fair that a contingency be added to the present day costs to account for future cost variations in any individual case. For the estimation of contingency, I take the following into consideration.

The 16 year formula under s 28A of the Act assumes that the lump sum will be invested at 6.25%pa, and thus generating indefinitely the intended monthly payment. In seeking to estimate a contingency to account for future cost increases of nursing care, pampers and wheelchairs, an assumption of cost increases of up to that magnitude is not unreasonable. Although in percentage terms the figure appears small, the accumulated effect of such small increases over time can be considerable.

It is fair to assume that a normal healthy person could live up to 70 years old. But we are concerned with making a fair estimate of the needs of the respondent for nursing care, pampers and wheelchairs, and not a normal healthy person. An assumption that the respondent could live to 70 years is rather optimistic. In my judgment, an assumption that he could expect to live to 60 years of age is neither too optimistic nor too pessimistic. I would add that this does not mean the respondent will have no funds after the age of 60 years, but this estimate is only for the purpose of estimating the contingency to be applied.

Considering that the respondent may be expected to live for another 46 years, a contingency of 100% is to be applied, ie to double the present day costs. The awards should be:

(i)	Nursing care: RM200 x 2 x 12 x 16	=	RM 76,800
(ii)	Pampers: RM129 x 2 x 12 x 16	=	RM 49,536
(iii)	Wheelchair RM500 x 2 x 16/2	=	RM 8,000
	TOTAL		RM134,336

To summarize, these sums have been arrived at by applying *Marappan & Anor v Siti Rahmah bte Ibrahim* wherein the Supreme Court had accepted as correct the application of the s 28A(2)(d) of the Act to nursing care, and by extension to pampers and wheelchair costs. Although these sums appear modest compared to a straight line multiplication, these sums are expected to be deposited or placed in safe investments. If placed in deposit accounts or investments with at least 6.25% return, these sums would return excess amounts in the initial years which could be saved to cover cost increases in later years.

A further ground of appeal is that the learned judge had erred in ordering interest at the rate of 8% from the date of service of the writ of summons to the date of judgment for post trial portions of the above costs. Counsel for the respondent properly conceded. This ground of appeal is therefore allowed.

The appeal on quantum in respect of nursing care, pampers and wheelchair is allowed, and the damages allowed are as set out above. A

Appeal allowed.

Reported by Peter Ling

B

C

D

E

F

G

H

I